

Issues: Group III Written Notice (continued unsatisfactory attendance), and Termination due to accumulation; Hearing Date: 03/28/17; Decision Issued: 03/29/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10940; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10940

Hearing Date: March 28, 2017
Decision Issued: March 29, 2017

PROCEDURAL HISTORY

On November 21, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of attendance policy.

On November 29, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 4, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a DSA II at one of its facilities. She had prior active disciplinary action. On May 5, 2016, Grievant received a Group I Written Notice for unsatisfactory attendance/excessive tardiness. On July 1, 2016, Grievant received a Group I Written Notice for unsatisfactory attendance/excessive tardiness. On July 15, 2016, Grievant received a Group II Written Notice for failure to follow instructions.

Facility employees were expected to obtain approval from a supervisor prior to being absent from work. If an employee was absent from work without having first obtained approval from a supervisor, the employee's absence was considered to be an unscheduled absence. The Facility counseled employees who had accumulated 32 hours of unscheduled absences in a year.

In certain circumstances, the Facility would not count an absence as unplanned leave if the employee presented mitigating circumstances to justify the unscheduled absence. For example, if an employee was unexpectedly absent from work due to illness, the Facility would excuse the absence if the employee presented a doctor's note documenting the illness. When Grievant was absent from work unexpectedly, she was given an opportunity to present documents to excuse her absence.

Grievant demonstrated a pattern of unscheduled absences. She was counseled regarding the excessive number of unscheduled absences.

As of July 1, 2016, Grievant had accumulated 120 hours of unplanned leave. She received a Group I Written Notice and was counseled regarding her unscheduled absences.

Grievant was scheduled to work eight hours on August 17, 2016 but she failed to report to work. Grievant was scheduled to work eight hours on September 3, 2016 but she failed to report to work. Grievant did not provide documents to the Supervisor to excuse her absences on these dates and the Agency deemed her absences to be unscheduled.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Employees are expected by the Agency to report to work as scheduled. The Facility has a progressive policy regarding unplanned absences. The Agency allows employees to be unexpectedly absent without suffering any consequences. Once an employee’s absences reach a threshold of 32 hours of unscheduled absences, however, the employee is counseled regarding his or her behavior.

Policy 053-019 governs Attendance. This policy defines:

Absence Without Approval – An absence where the employee did not receive prior approval.

Policy 280-ii governs Employee Unplanned Leave. Section 5 states:

65 hours of unplanned leave results in a Group I Written Notice (Standards of Conduct). Each additional eight or more hours results in another Group I provided that the unplanned leave balance continues to exceed 65 hours, as stated in ... Policy HR053-19.²

Grievant had accumulated sufficient hours of unscheduled absences to justify the issuance of a Group I Written Notice on July 1, 2016. Grievant had an unscheduled absence of eight hours on August 17, 2016. Grievant had an unscheduled absence of

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Agency Exhibit 6.

eight hours on September 3, 2016. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice as specified in Policy 280-ii.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. In this case, Grievant received two prior Group I Written Notices for unsatisfactory attendance. Accordingly, the Agency may elevate the Written Notice before the Hearing Officer from a Group I offense to a Group II offense.

The Agency issued Grievant a Group III Written Notice for unsatisfactory attendance. Nothing in State policy permits the Agency to elevate what would otherwise be a Group I offense to a Group III offense.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

Grievant was often absent from work because she was involved in court proceedings and had difficulty finding care for her child. Grievant presented documents showing the reasons for her absences from work. The Agency properly considered those documents and mitigated the unscheduled absences when appropriate. Grievant did not present sufficient documentation to reverse the disciplinary action. For example, Grievant did not provide any documents to mitigate her unscheduled absence on August 17, 2016 and September 3, 2017.

Grievant argued that the Supervisor showed favoritism towards other employees when granting leave requests. No credible evidence was presented to support this assertion.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

³ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.